Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1832, 80-2170, 80-2171

IN THE

Supreme Court of the United States

October Term, 1980

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,

v.

JAGDISH RAI CHADHA, *et al.*,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
et al.,
Respondents.

UNITED STATES SENATE,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
et. al.,
Respondents.

MEMORANDUM OF APPELLEE/RESPONDENT JAGDISH RAI CHADHA

Alan B. Morrision
(*Counsel of record*)
John Cary Sims
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
John Pohlman
Pohlman & Heckel
654 Sacramento Street
San Francisco, California 94111
(415) 433-7654

Attorneys for Appellee-Respondent
Jagdish Rai Chadha

July 20, 1981

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

Page

Reasons for Reviewing Only the Constitutionality and Severability of the Legislative Veto 2

Conclusion 9

TABLE OF AUTHORITIES

Cases Page

American Textile Mfgs. Institute Inc. v. Donovan, _____ U.S. _____, 49 U.S.L.W. 4720 (1981) 8

GTE Sylvania Inc. v. Consumers Union of the United States, 445 U.S. 375 (1980) 4

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 8

United States v. Lovett, 328 U.S. 303 (1946) 3

Constitutional Provisions

Article I, Section 7 ..... 6, 7
Article I, Section 8, Clause 18 6,7
Article II, Section 2, Clause 2 8
Article III 4

Statutes and Other Legislative Materials

8 U.S.C. § 1254 ..... 2, 5, 7
8 U.S.C. § 1254(c)(2) 2, 8, 9
28 U.S.C. § 1252 ..... 2, 3
H. Res. 817, 96th Cong., 2d Sess., *approved*, 126 Cong. Rec H. 11747 (Daily ed. Dec. 3, 1980) 5

IN THE

Supreme Court of the United States

October Term, 1980

Nos. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,

v.

JAGDISH RAI CHADHA, *et al.*,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
et al.,
Respondents.

UNITED STATES SENATE,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
et. al.,
Respondents.

MEMORANDUM OF APPELLEE/RESPONDENT JAGDISH RAI CHADHA

This memorandum is submitted by the appellee/respondent Jagdish Rai Chadha ("respondent") to set forth his position regarding these three pending cases all seeking review of a decision granting his petition to review a decision of the appellant/respondent Immigration and Naturalization Service ("INS"). The INS agreed that

Chadha was entitled to adjust his status to that of a permanent resident alien pursuant to 8 U.S.C. § 1254, but when that determination was overriden by the House of Representatives pursuant to 8 U.S.C. § 1254(c)(2), the INS ordered Chadha deported. For the reasons set forth below, Chadha agrees that this Court should hear the merits of the constitutional challenge to the legislative veto, but urges the Court to refuse to grant review on the procedural issues raised by the House of Representatives and the Senate. Since the facts are not in dispute and are fully covered in the statements of the case filed by the INS, the House, and the Senate, as well as the court below, they will not be repeated here.

REASONS FOR REVIEWING ONLY THE CONSTITUTIONALITY AND SEVERABILITY OF THE LEGISLATIVE VETO

There are four general categories of issues presented for consideration by this Court in these three related proceedings. In respondent Chadha's view, the Court should agree to hear only the constitutional challenge to the legislative veto and the closely related question of the severability of the veto from the remainder of section 1254.

A. The first question, which is raised by the motions to dismiss filed by the Senate and the House, asks the Court to rule on whether the United States may rely on 28 U.S.C. § 1252 to appeal a decision when it supports the ruling below. As the motion to dismiss filed by the Senate acknowledges (pp. 3-5), there are some situations in which the Attorney General may seek appellate review of a decision with which he agrees on the merits, in order to insure that this Court may pass on important constitutional questions. Thus, the only issue is whether this case is controlled

by cases such as *United States v. Lovett*, 328 U.S. 303 (1946), in which the Executive Branch sought and obtained review in this Court of a ruling of the Court of Claims that it supported, holding unconstitutional an act of Congress. In light of the petitions for certiorari filed by both the Senate and the House of Representatives, both of which raise the same constitutional questions presented in the appeal of the INS, it is not clear that the jurisdictional question must be resolved. In any event, respondent Chadha takes no position on the merits of the section 1252 question, but he does believe that it does not warrant plenary consideration by this Court, especially since it would divert the attention of the parties and the Court from the vital constitutional questions which are properly presented.

B. Second, both the Senate and the House contend that respondent Chadha should have sued in a district court, where a single federal judge would have passed judgment on this momentous constitutional question, rather than filing directly in a court of appeals. The court below dealt with the contention in great detail (4a-11a), and its decision is plainly correct. The only discussion of this issue by either petitioner is contained in a single paragraph on page 22 of the petition of the House of Representatives, which simply asserts that the court below was in error. Even if that were correct, it is not a sufficient reason, standing alone, for this Court to grant certiorari on that question. Therefore, the question of whether this case was improperly filed in a court of appeals should not be reviewed by this Court.

C. The third group of issues are procedural arguments, the effect of which, if accepted, would bar the doors of the federal courts to an individual who was about to be deported based upon an unconstitutional act of the House

of Representatives. Without disputing that deportation of Chadha would plainly cause him injury in fact, the House and Senate nonetheless claim that he lacks standing because the separation of powers and other constitutional doctrines on which he relies were not intended to benefit deportable aliens, and thus they cannot bring suit based on them. Similarly, both Houses argue that his claim is also precluded as a nonjusticiable political question. The court below carefully considered and correctly rejected each of these arguments (19a-22a), and nothing in either petition suggests any reason for this Court to review those rulings.

Related to the standing and political question arguments is the claim by the House and the Senate that since respondent Chadha and the INS agreed that the veto was unconstitutional, the court of appeals had no power to grant the relief sought because there was no case or controversy within the meaning of Article III of the Constitution. However, petitioners overlook the fact that the INS asserted that, absent a court order, it was obliged to deport Chadha, and hence, at least as to the question of whether he was entitled to judicial relief from the deportation order, sufficient adversity existed to permit the court to direct the INS to cancel Chadha's deportation order. *Cf. GTE Sylvania Inc. v. Consumers Union of the United States*, 445 U.S. 375, 382-83 (1980). Moreover, petitioners' argument, if accepted, would mean that respondent Chadha would be denied an opportunity to bring his constitutional challenge to the deportation order because his adversary, the INS, agreed with him, but that he would have been permitted to seek relief from deportation if the INS had argued that the veto was constitutional. Surely nothing in Article III dictates such an irrational result.

Moreover, by the time of oral argument in the Ninth Circuit, both the Senate and House had filed briefs sup-

porting the statute, and both argued in that court. Thus, the court was plainly correct in finding the requisite adverseness (22a-24a) as this Court would be, especially now that the Senate and House have intervened and have sought review in this Court on the merits of the constitutional ruling.

The House and Senate also urge this Court to grant review on another question designed to avoid a decision on the merits. They contend that the court of appeals should have remanded the case to the INS for further consideration in light of the fact that Mr. Chadha had married a U.S. citizen. Although the constitutional issue might have been avoided in this case had Chadha's status been adjusted because of his marriage, to have done so would have denied Chadha the full relief to which he was entitled. Because of the time it took the House to veto his status adjustment and the court below to decide his case, more than five years have elapsed since his status was originally adjusted by the INS, and hence, as the court of appeals found (17a-18a, n.6) and the INS has not disputed, he is immediately eligible for U.S. citizenship. On the other hand, approximately four additional years would be required for him to become a United States citizen if he sought that status based on his wife's citizenship. There is simply no basis to deny Chadha's right to be a U.S. citizen for four years simply to avoid deciding a constitutional question which surely will be presented in other cases in which a similar adjustment of status under section 1254 has been vetoed by one House of Congress. *See e.g.*, H. Res. 817, 96th Cong., 2d Sess., *approved,* 126 Cong. Rec. H 11747 (Daily ed. Dec. 3, 1980).

Accordingly, we urge the Court to refuse to consider all of the questions which seek to avoid a decision on the

merits since none of them is worthy of plenary consideration by this Court.

D. Respondent Chadha agrees, however, that the constitutional question presented is substantial and that the result is not plainly foreclosed by prior decisions of this Court. He believes that, while the court of appeals was absolutely correct in rejecting the congressional defense based on the "necessary and proper" clause of the Constitution, and in finding a violation of separation of powers principles, it would also have been correct in striking down the veto as a violation of the presentment clause in Article I, Section 7 and as contrary to principles of bicameralism. Since respondent intends to rely on these arguments in this Court, as he did below, it may be helpful to the Court to summarize his position briefly at this stage as a further indication of the nature of the constitutional challenge.

The doctrine of separation of powers precludes one branch of government, here the legislature, from overruling the actions of another, here the executive. The sole exception arises where there is a specific check or balance written into the Constitution, such as the role of the President in the legislative process, or that of the Senate in appointments and treatymaking. Admittedly, there is no such specific check or balance available to Congress here.

The principal purposes behind separation of powers are to prevent the undue accretion of power in a single branch and to assure that the branch to which the power is delegated retains control over it. As the court below recognized, it is necessary to examine the precise statutory scheme in order to determine the function of the veto in it, and then to measure the roles assumed by Congress in exercising the veto within the separation of powers framework.

Under this analysis it is plain that the veto here is unconstitutional. Thus, if the House of Representatives were reviewing the INS' interpretation of section 1254, but disagreed that Chadha fell within its mandate, it was performing a judicial, not a legislative, function which it is not permitted to do. On the other hand, if the House were seeking to share responsibility for, or control the exercise of, the discretionary power of the INS to adjust the status of aliens under section 1254, it was attempting to execute the laws itself, which is an impermissible function for the Congress to perform. Thus, viewed either as a judicial or executive act, the veto violates the principles of separation of powers. And if the veto is instead seen as a legislative activity, it is also unconstitutional since the enactment of legislation requires the concurrence of both Houses of Congress and an opportunity for the President to sign the legislation or veto it. Since the only constitutionally-permitted method of passing legislation was not utilized, the veto is extra-constitutional and unauthorized.

Moreover, there is no residual, non-legislative power in Congress to change policy regarding aliens. To hold otherwise would deprive the President of his right under Article I, Section 7 to participate in all policy decisions of a legislative character affecting the public. Similarly, the "necessary and proper" clause, Article I, Section 8, Clause 18, is of no help since it authorizes only laws that do not violate other provisions of the Constitution, such as those requiring separation of powers. Furthermore, as the court of appeals correctly concluded (56a), Congress' power under that clause is only to "make all laws" and "not to exercise power in any way it deems convenient."

Quite apart from separation of powers issues, the one-House veto transgresses principles of bicameralism. The powers of Congress are confined to those enumerated in

the Constitution, and the history behind the creation of a bicameral Congress demonstrates that, except for powers specifically assigned to one House in the Constitution itself (such as those in Article II, Section 2, Clause 2 relating to appointments and treaties), neither House has the power to act in a way that affects the public except with the concurrence of the other.

Finally, even if the action of the House does not violate any of these specific constitutional guarantees, it still must fall since the authority for the veto constitutes an undue delegation of legislative power. *See Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *American Textile Mfgs. Institute, Inc. v. Donovan,* ___ U.S. ___, 49 U.S.L.W. 4720, 4734-36 (1981) (Rehnquist, J. and Burger, C.J., dissenting). Since the veto in section 1254(c)(2) can be exercised without any standards and without judicial review, it would plainly be improper if granted to an administrative agency. Although the veto was exercised by elected representatives, they were not functioning in a legislative capacity and cannot claim the protection of legislative freedom since the necessary checks and balances to the unfettered discretion of the House of Representatives – participation by the Senate and President – were lacking.

Respondent Chadha also agrees that the issue of whether the veto is unconstitutional is closely related to the question of whether that provision is severable from the remainder of the statute upon which he relies to adjust his status. This Court has examined severability questions whenever constitutional challenges have been presented, and respondent acknowledges that if the Court decides to review the merits of the constitutional claim, this severability issue should also be decided.

CONCLUSION

For the foregoing reasons, the Court should agree to hear the constitutional challenge to the legislative veto in 8 U.S.C. § 1254(c)(2) and the related issue of its severability. The remaining questions presented in the petitions for certiorari – numbers 1-4 in No. 80-2170 and numbers 1 and 4-7 in No. 80-2171 – should specifically be excluded from plenary consideration by this Court.

Respectfully submitted,

Alan B. Morrison
John Cary Sims

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

John Pohlman

Pohlman & Heckel
654 Sacramento Street
San Francisco, California 94111
(415) 433-7654

Attorneys for Appellee/Respondent
Jagdish Rai Chadha

July 20, 1981